Nos. 90-453 and 90-466

In the Supreme Court of the United States

OCTOBER TERM, 1990

RORY DOREMUS, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID DOREMUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the prosecution of petitioners for violating Forest Service regulations in the course of mining their unpatented claims on federal lands violated their rights under federal mining statutes or the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 888 F.2d 630.[1] The opinion of the district

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[1] "Pet. App." refers to the appendix to the petition in No. 90-453.

court (Pet. App. 80a-111a) is reported at 658 F. Supp. 752. The magistrate's opinion, Memorandum Opinion, Nos. 85-3095-M-01 to 85-3098-M-01 (D. Idaho June 18, 1986), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1989. The petitions for rehearing were denied on May 29, 1990. Pet. App. 30a. The petition for a writ of certiorari was filed on July 27, 1990. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial before a United States magistrate, petitioners, who are brothers engaged in prospecting on unpatented mining claims, were convicted of damaging natural features on national forest service land, in violation of 36 C.F.R. 261.9(a),[2] and of deviating from their mine operating plan, in violation of 36 C.F.R. 261.10(k).[3] Each defendant was ordered to pay $500 in restitution, $90 in fines, and $50 in court costs. Pet. App. 32a. The district court and the court of appeals upheld both convictions.

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[2] 36 C.F.R. 261.9(a) provides in part as follows:

> The following are prohibited:
>
> (a) Damaging any natural feature or other property of the United States.

36 C.F.R. 261.2 defines "damaging" as "to injure, mutilate, deface, destroy, cut, chop, girdle, dig, excavate, kill, or in any way harm or disturb."

[3] 36 C.F.R. 261.10(k) provides in part as follows:

> The following are prohibited:
>
> * * * * *
>
> (k) Violating any term or condition of a special use authorization, contract or approved operating plan.

1. The surface effects of operations on unpatented mining claims in the national forests are subject to regulation by the Forest Service of the Department of Agriculture. The Act of June 4, 1897, ch. 2, 30 Stat. 35, codified at 16 U.S.C. 478 (known as the Organic Administration Act of 1897), authorizes entry into national forests for "all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof," subject to "rules and regulations" promulgated by the Secretary of Agriculture.[4] See *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 582 (1987).

In 1955, Congress amended the Act of May 10, 1872, ch. 152, § 1, 17 Stat. 91, codified at 30 U.S.C. 22 *et seq.* (known as the Mining Act of 1872), by enacting Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, codified at 30 U.S.C. 611-615 (known as the Multiple Surface Use Act of 1955). Section 3 clarified the general right of entry for mining activity in national forests by providing for "conservation and utilization of timber, forage, and other surface resources on mining claims, and on adjacent lands." H. R. Rep. No. 730, 84th Cong., 1st Sess. 8 (1955). Congress expressly reserved the federal government's right "to manage and dispose of the vegetative surface resources * * * and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States)" on unpatented mining claims located after July 23, 1955. 30 U.S.C. 612(b); see also *United States* v. *Richardson*, 599 F.2d 290, 293-295 (9th Cir. 1979), cert. denied, 444 U.S. 1014 (1980). The 1955 Act further provides that no use of the surface resources

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[4] The Organic Administration Act originally delegated authority over the national forests to the Secretary of the Interior. In 1905, that authority was transferred to the Secretary of Agriculture. Act of Feb. 1, 1905, § 1, 33 Stat. 628, 16 U.S.C. 472.

by the government or its permittees may "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." See 30 U.S.C. 612(b); see also Section 612(c) (permitting severance or clearance of timber if "reasonably incident" to mining operations).[5]

2. In 1977, the Secretary of Agriculture promulgated regulations governing public use of land administered by the Forest Service. See 36 C.F.R. Pt. 261. The regulations include prohibitions against "[d]amaging any natural feature or other property of the United States," 36 C.F.R. 261.9(a), and against "[v]iolating any term or condition of a special-use authorization, contract or approved operating plan," 36 C.F.R. 261.10(k). Violation of one of the prohibitions in Part 261 is punishable by a fine of up to $500, imprisonment for up to six months, or both. 16 U.S.C. 551; 36 C.F.R. 261.1(b).

The operating plans referred to in 36 C.F.R. 261.10(k) are governed by 36 C.F.R. Pt. 228. These regulations provide that no work on an unpatented mining claim that is

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[5] On the specific subject of timber cutting, Section 612(c) of 30 U.S.C. provides that:

> Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under subsection (b) of this section. Any severance or removal of timber which is permitted under the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management.

likely to cause a "significant disturbance of surface resources" shall proceed without an approved operating plan. 36 C.F.R. 228.4(a). Before beginning work of that nature, a miner must submit for approval by the District Ranger of the Forest Service a proposed plan that describes the scope of the intended activity and proposed measures to minimize environmental harms. 36 C.F.R. 228.4(c), 228.8. All mining operations must conform to the terms of the plan, 36 C.F.R. 228.4(b), 228.5(a), which is subject to modification at the request of the claimant according to procedures prescribed by regulation. See 36 C.F.R. 228.4(d)-(e); see also *United States* v. *Brunskill*, 792 F.2d 938, 940 (9th Cir. 1986); *United States* v. *Goldfield Deep Mines Co.*, 644 F.2d 1307 (9th Cir. 1981), cert. denied, 455 U.S. 907 (1982).

3. In 1972, petitioners staked a series of mining claims in the Red River Ranger District of the Nez Perce National Forest in central Idaho. Magistrate's Memorandum Opinion, Nos. 85-3095-M-01 to 85-3098-M-01 (D. Idaho June 18, 1986), slip op. 2 [hereinafter Mag. Op.]. The two petitioners worked the claims every year between 1972 and 1985. Except in the first few years, they mined under an approved operating plan. The 1985 operating plan was signed by Rory Doremus and the District Ranger in May 1985. *Ibid.*

The 1985 plan described the scope of the authorized exploration. See Pet. App. 115a. The plan provided for modification or supplementation in the event that the nature of the operation changed, and it stipulated that requests for amendments to the plan were to be submitted in writing and approved by the Forest Service before petitioners deviated from the operating plan in any way. *Id.* at 147a. After the plan had been signed, petitioners orally requested certain amendments, but none relevant to the

charges here was granted. *Id.* at 3. Petitioners did not appeal the denials of their requests.[6]

The operating plan stated that, for each of petitioners' six claims, "[n]o more than five trenches will be open at one time," excluding one "discovery pit"—a trench in which potentially valuable mineral deposits are found in the course of mining. Pet. App. 115a-116a. It prohibited "construction or improvement of roads, trails, bridges or any other means of access"—including "Temporary Roads"—without prior written approval. *Id.* at 118a, 121a. The plan also prohibited the cutting of "live, green trees" for firewood; any firewood was to be obtained from trees designated by a Forest Service inspector. In addition, "[n]o green trees [were to] be used in camp construction unless designated by the inspector." Pet. App. 128a. The plan also stated that "[t]imber requirements are small for

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[6] Rory Doremus and Forest Service employee Ronald Gardner gave inconsistent testimony as to whether Gardner ever purported to grant oral modifications of the operating plan. Compare Mar. 14, 1986 Tr. 19-20, 127-128 (testimony of Ronald Gardner), with *id.* at 129-132 (testimony of Rory Doremus). The magistrate found that "no amendments were ever agreed to by the Forest Service, and no amendments, either verbal or in writing, ever occurred." Mag. Op. 3.

The court of appeals ruled that "the magistrate's finding that no oral amendments to the plan were made in 1985, except for an authorization to remove one tree, is not clearly erroneous." Pet. App. 27a. The court of appeals' suggestion that the Forest Service purported to grant an oral modification with respect to a single tree appears to be based on Gardner's testimony that he designated a tree for removal after Rory Doremus expressed concern that it could fall into an adjacent mining pit. See Mar. 14, 1986 Tr. 126-128. The court of appeals did not discuss whether Gardner's action could have come within his authority under the plan to designate trees for use as firewood. See Pet. App. 127a. It also did not discuss whether any oral modification could have been effective in view of the plan's requirement that requests for amendments and any approvals of those requests be in writing.

this operation at this time. If timber is needed operator is asked to cut small dead timber." *Id.* at 129a. The plan did not otherwise address the clearance of trees from prospecting sites.

4. In late July 1985, Forest Service officials conducted several inspections of petitioners' operations. Mag. Op. 3-4. The inspections revealed that several trees had been pushed over and that a road had been constructed through the trees on one side of the claim. Mag. Op. 4; Pet. App. 7a, 82a-83a, 104a. The Forest Service also found more than 30 open trenches. Mag. Op. 3-4; Pet. App. 7a, 83a. All told, petitioners' operations had damaged surface resources covering about 1.25 acres of the national forest, which far exceeded the roughly .25 acre of surface damage authorized in the operating plan. Mag. Op. 4.

On October 21, 1985, each petitioner was issued two violation notices, one for damaging trees and other natural features in violation of 36 C.F.R. 261.9(a), and one for opening more trenches than permitted under the operating plan, in violation of 36 C.F.R. 261.10(k). Pet. App. 34a-39a.

5. Petitioners contested the charges against them in proceedings before a United States magistrate, which included a trial and extensive post-trial briefing. Before the magistrate, petitioners argued, *inter alia,* that the regulations and operating plan taken together were unconstitutionally vague, both facially and as applied; that the regulations and operating plan violated their statutory right to mine; that the United States had failed to prove the charges beyond a reasonable doubt; that the 1985 operating plan was procedurally defective because the Forest Service had "unilaterally imposed" changes in the plan proposed by petitioner; and that, even if valid, the operating plan had been modified by an oral agreement

authorizing the conduct in question. Petitioners' Post-Trial Br. 1-24; Petitioners' Post-Trial Reply Br. 1-7.

The magistrate rejected petitioners' contentions. The magistrate found that Sections 261.9(a) and 261.10(k) were neither vague nor indefinite on their face or as applied to this case, Mag. Op. at 5; that the regulations and operating plan did not impose unreasonable restrictions on petitioners' statutory rights to exploit mineral deposits on public land, *id.* at 6-7; that the United States had proved the violations charged beyond a reasonable doubt, *id.* at 7-8; that the defendants had agreed to the operating plan as written, *id.* at 7; and that "no amendments, either verbal or in writing, ever occurred," *id.* at 3.

6. Petitioners appealed the magistrate's ruling to the district court, reiterating the arguments that the regulations they were charged with violating were unconstitutionally vague and that those regulations as well as the restrictions contained in the operating plan violated their statutory rights. The district court upheld the magistrate's decision. Pet. App. 80a-111a. The court rejected petitioners' contention that miners can defend against prosecution under Forest Service regulations by attempting to establish that their conduct, although damaging to surface resources and inconsistent with their operating plans, is "reasonably incident" to mining operations. The court explained that the operating plan regulations, 36 C.F.R. Pt. 228, had been promulgated "within the framework dictated by Congress to balance the competing interests of the miners and the environment and to provide definition to what is and is not considered reasonable." Pet. App. 89a. Operating plans, the court explained, "provide the miner with a description of that conduct which is acceptable under the circumstances and that conduct which tips the scales to the detriment of the environment." *Id.* at

93a-94a.[7] The court also held that the regulations at issue—36 C.F.R. 261.9(a) and 261.10(k)—were not unconstitutionally vague on their face or as applied. Pet. App. 95a-108a. It also affirmed the magistrate's finding that the government had proved violations of both regulations beyond a reasonable doubt. *Id.* at 108a-109a.

7. On appeal, petitioners renewed the arguments that the district court had rejected. David Doremus also repeated arguments concerning Forest Service coercion and oral modifications that had been made to the magistrate but abandoned in the district court. The court of appeals affirmed the judgment of the district court. Pet. App. 1a-29a.

The court of appeals rejected petitioners' assertion that their statutory right to mine on public land shielded them from prosecution for violating the conditions of their operating plan. Specifically, the court held that both Section 261.9(a) and Section 261.10(k), as applied to peti-

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[7] The court explained (Pet. App. 92a-93a):

> [I]n this area Congress has provided broad policy statements recognizing the competing interests of mining operations and the environment. Congress has directed the Secretary of Agriculture to draft regulations which do not materially interfere with mining operations and the reasonable incidents thereto, but which, at the same time, protect the environment from unbridled destruction. The regulations drafted by the Secretary cannot contemplate or define what is reasonable conduct with respect to mining under all circumstances. With this in mind, the regulations provide for a vehicle by which representatives of the Secretary, together with the mining operator, define what is reasonable under the circumstances attendant the specific mining operation. This vehicle is the operating plan. The regulations of the Secretary also provide that violation of this plan is prohibited, since such action would be unreasonable under the circumstances. * * * Conduct which is violative of the operating plan violates the regulatory scheme and the statutory scheme.

tioners' conduct, were consistent with the mining laws, including 30 U.S.C. 612, which permits miners to make uses of surface resources that are "reasonably incident" to the mining operation. Pet. App. 12a-17a. The court stated that "[t]he regulatory scheme of requiring a notice of intent to operate and approval of an operating plan is a reasonable method of administering the statutory balance between the important interest[s] involved here [which] were intended to and can coexist." *Id.* at 13a (internal quotation marks omitted). The court explained that "[t]he purpose of requiring prior approval is to resolve disputes concerning the statutory balance *before* operations are begun, not after." The court added that if petitioners were unsatisfied with the conditions in their operating plan, "they could have appealed to the Regional Forester under 36 C.F.R. § 228.14 (1987)." Pet. App. 13a.

The court also rejected petitioners' vagueness challenge to Sections 261.9(a) and 261.10(k). Pet. App. 17a-25a. In particular, the court disagreed with petitioners' contention that the pertinent statutory provisions and regulations could be read to permit conduct that is not in compliance with an operating plan but is nevertheless "reasonably necessary" to a mining operation.[8] The court noted that petitioners could easily have "clarif[ied] the meaning of the regulation[s]"—including the relationship among all the regulations and statutory provisions on which they rely—"by [their] own inquiry, or by resort to the administrative process." Pet. App. 23a. With respect to 36 C.F.R. 261.10(k), which prohibits deviation from an

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[8] That contention was based in part on the language of 36 C.F.R. 261.1(b), which states that "[n]othing in this part shall preclude activities as authorized by" the Mining Act as amended, and the language of 36 C.F.R. 228.7, which states that a notice of noncompliance will issue "[i]f an operator fails to comply with * * * his approved plan of operations and the noncompliance is unnecessarily or unreasonably causing injury, loss or damage to surface resources." See Pet. App. 20a-21a.

operating plan, the court found that the regulation was not vague as applied to petitioners because the plan was "crystal clear" in prohibiting the simultaneous opening of more than five trenches on petitioners' claim. Pet. App. 19a-20a. With respect to the other challenged regulation, 36 C.F.R. Section 261.9(a), which prohibits "[d]amaging any natural feature or other property of the United States," the court found that the regulation was sufficiently precise to give petitioners notice that the regulation covered their actions in "destroying [or] push[ing] over" live trees.[9]

ARGUMENT

1. Petitioners contend that the 1985 operating plan imposed limitations on their mining activities that should be held unenforceable in light of their rights under federal mining statutes. Petitioners also appear to suggest that the scope of the regulatory prohibitions under which they were convicted should be viewed as circumscribed by their right to conduct activities on their claims that are "reasonably incident" to mining, see 30 U.S.C. 612, and that their activities satisfied that statutory standard.[10]

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[9] The court also rejected petitioner David Doremus's contention that the magistrate's factual findings concerning oral amendments to the plan were in error. Pet. App. 27a. The court did not explicitly address the claim that the brothers had been coerced to agree to the plan, but it did recite the magistrate's factual finding that petitioners had proposed the limits on the number of trenches that were incorporated in the plan. *Id.* at 7a. The court refused to consider constitutional arguments alleging violations of the separation of powers and the right to a jury trial, which were raised for the first time on appeal. *Id.* at 27a.

[10] Rory Doremus, the petitioner in No. 90-453, seeks review only of his conviction under Section 261.9(a). David Doremus, the petitioner in No. 90-466, seeks review of both of his convictions.

The court of appeals properly rejected these arguments. As the courts below observed, the Forest Service regulations are designed to give content to the statutory concept of activity "reasonably incident" to mining. The regulations authorize the Service to determine what conduct is "reasonably incident" to mining in each case, and they provide a mechanism for ensuring that mining activities conform to that standard by requiring the submission and approval of an operating plan before mining activities may commence. This regulatory scheme contemplates that claimants who are dissatisfied with proposed restrictions in their plans, or who believe that those restrictions infringe their statutory rights, will challenge their plans before the agency at the approval stage or formally seek an amendment of the plan. See Pet. App. 13a (the regulatory requirement that miners seek approval of their operating plans is intended "to resolve disputes concerning the statutory balance *before* operations are begun not after"). Petitioners took neither of those steps; instead, they agreed to the plan. Mag. Op. 2.[11] By doing so, petitioners failed to take advantage of available administrative remedies, thereby forfeiting the right to challenge the

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[11] Petitioners could have filed an appeal of the restrictions on the number of open trenches in their plan with the Regional Forester under 36 C.F.R. 228.14 (1987). (Current appeal procedures appear at 36 C.F.R. Pt. 251, Subpt. C.) See Pet. App. 13a-15a; 26a-27a. The Regional Forester's decision would have been reviewable under the Administrative Procedure Act, 5 U.S.C. 702(a). See Pet. App. 13a, citing *Sabin* v. *Butz*, 515 F.2d 1061, 1065 (10th Cir. 1975) (APA review of Forest Service decision to deny special use permit).

Petitioners did request some oral amendments to their plan, which the Forest Service denied. Petitioners, however, failed to seek review of those denials under the APA. In any event, petitioners' operating plan provided that any requests for amendments to the plan were to be in writing.

terms of the plan. See *McKart* v. *United States*, 395 U.S. 185, 194-195 (1969).

The requirement that litigants exhaust available administrative remedies rather than challenge administrative action in litigation is not confined to situations where the governing statute expressly requires exhaustion. See *Glass Packaging Inst.* v. *Regan*, 737 F.2d 1083, 1093 (D.C. Cir.), cert. denied, 469 U.S. 1035 (1984); *American Iron & Steel Inst.* v. *EPA*, 526 F.2d 1027, 1050-1051 (3d Cir. 1975). Nor is it confined to situations where the option of pursuing the administrative process to completion remains open at the time the litigation begins. See *McKart*, 395 U.S. at 194-195. To be sure, whether the requirement of exhaustion applies in a particular case depends on the administrative scheme at issue and the factual context. See *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *McKart*, 395 U.S. at 193. Where, as here, enforcement of the exhaustion requirement forecloses a possible defense to criminal liability, the governmental interest in adherence to the doctrine must outweigh the burden placed on the criminal defendant. See *McKart*, 395 U.S. at 197; *Yakus* v. *United States*, 321 U.S. 414 (1944). The reasons for requiring exhaustion in this case, however, are quite compelling. Operating plans embody the informed judgment of the Forest Service as to the level of surface damage that is reasonably incident to a particular mining operation. The exercise of agency expertise to develop concrete, site-specific standards that balance conflicting statutory goals of mineral development and national forest preservation would be circumvented if miners could "blithely ignore Forest Service regulations and argue afterward that their conduct was reasonable." Pet. App. 15a. The case for requiring exhaustion of administrative remedies is particularly compelling when the immediate basis for liability is

not simply a generally applicable regulation, but an operating plan that has been specifically designed for a particular individual and with which that individual has agreed to comply.

2. Petitioners argue (90-453 Pet. 25-27; 90-466 Pet. 15) that their convictions violate the due process requirement that criminal offenses be defined with sufficient clarity to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954).

Contrary to petitioners' contention, the regulations provided fair warning that petitioners' activities were unlawful. Section 261.9(a) prohibits the "damaging" of "any natural feature" within the national forest without authorization, and "damaging" is defined to include cutting or excavating. 36 C.F.R. 261.2. Petitioners' unauthorized acts of cutting timber, excavating trenches, and building a road clearly constituted acts of "damaging * * * natural features" within the forest without authorization. Similarly, Section 261.10(b), which prohibits "[v]iolating any term or condition of * * * [an] approved operating plan" could hardly be clearer. The regulation plainly prohibits any deviation from the operating plan that is not authorized by a properly issued amendment.

The court of appeals correctly rejected petitioners' argument that 36 C.F.R. 261.1(b), which states that nothing in 36 C.F.R. Pt. 261 "shall preclude activities as authorized by the * * * U.S. Mining Laws Act of 1872 as amended," can be construed to invite miners to look beyond their operating plans and other pertinent regulations for statutory permission to conduct activities "reasonably incident" to mining. 90-453 Pet. 15-16. The regulations at issue cannot be read to permit the application of a test of reasonableness independent of the terms of the operating plan. As the court of appeals stated, "[t]he flaw in [petitioners']

argument is that 30 U.S.C. § 612 does not authorize mining operators to act without Forest Service approval," Pet. App. 25a, and the regulations make it plain that mining may not be conducted without prior approval, 36 C.F.R. 228.4(a), or in violation of an approved operating plan, 36 C.F.R. 261.10(k), or in a manner that would "damage any natural feature," without authorization, 36 C.F.R. 261.9(a). Thus, the regulations that were the basis of petitioners' convictions provide ample notice that the mining activities on petitioners' claims that violated their terms were prohibited.

3. Petitioner Rory Doremus also contends (90-453 Pet. 26-28) that there was a failure of effective notice as to the illegality of the petitioners' tree clearing because the operating plan did not expressly prohibit the removal of live trees to clear the ground over prospecting sites. He argues that the Forest Service regulations did not provide fair warning that activities not mentioned in the operating plan as well as activities expressly forbidden could be illegal under Section 261.9(a).

This claim ignores the structure and language of the operating plan regulations. Operating plans provide concrete, site-specific guidance as to the balance between mineral exploration and the protection of surface resources in the national forests. See 36 C.F.R. 228.1. As a practical matter, it would be virtually impossible for an operating plan to forbid every kind of possible damage to surface resources. Forest Service regulations instead call for a description of "the type of operations proposed and how they would be conducted." 36 C.F.R. 228.4(c). They further provide that "[o]perations shall be conducted in accordance with an approved plan." 36 C.F.R. 228.5(a). As contemplated by the regulations, petitioners' operating plan describes the scope and location of authorized activities. But, while the plan includes a number of express

prohibitions, Pet. App. 114a-131a,[12] the inclusion of those prohibitions cannot mean that anything not specifically prohibited in the plan is permitted. That is particularly true with respect to conduct such as destroying trees, which is elsewhere prohibited in the Forest Service regulations.

4. Petitioner Rory Doremus contends (90-453 Pet. 27-28) that in affirming his conviction under Section 261.9(a), the court of appeals repudiated controlling precedent and therefore unfairly imposed on him a new and unforeseeable construction of the scope of criminal liability in this area. This contention is incorrect; the Ninth Circuit case on which petitioner relies does not shield miners from prosecution for violations of valid regulations and operating plans.

In *United States* v. *Cruthers*, 523 F.2d 1306 (9th Cir. 1975), the court of appeals reversed a miner's conviction for the theft of 70 pine trees from the surface of an unpatented mining claim. The miner, who used the trees to construct a cabin on his adjacent, patented claim, was found guilty of theft based on a jury instruction that 30 U.S.C. 612(c) did not permit the use of timber from an unpatented claim on private property "for any purpose." The court found that Section 612(c) required that timber cut from an unpatented claim be used only for purposes "reasonably incident" to the development of that claim, but did not require that the timber be used within the physical limits of the claim. 523 F.2d at 1307. The court of appeals' brief opinion gives few facts and makes no mention of an operating plan.[13]

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[12] Petitioners' unauthorized destruction of natural features encompassed not only the destruction of trees, but also unauthorized road construction and excavation. See Pet. App. 37a, 39a (violation notice noting damage to trees and "other surface resources"); see also Mag. Op. 4; Pet. App. 7a, 82a-83a. The road construction in particular violated an express prohibition in the operating plan.

[13] It is highly unlikely that Cruthers was subject to an operating plan when he cut the trees in question. The operating plan regulations

In any event, Ninth Circuit cases decided after *Cruthers* soundly refute petitioner's contention that the court has held that miners may conduct operations in violation of the requirements of their operating plans. See *United States* v. *Goldfield Deep Mines Co.*, 644 F.2d 1307, 1309 (1981) (affirming award of damages and injunctive relief against company that "cut trees, dug roads, erected structures, moved earth and otherwise damaged forest surface land" without an operating plan), cert. denied, 455 U.S. 907 (1982); *United States* v. *Weiss*, 642 F.2d 296 (1981) (affirming injunction against operations on unpatented national forest claim until miner complied with operating plan regulations); see also *United States* v. *Brunskill*, 792 F.2d 938 (9th Cir. 1986) (post-1985 case affirming injunction that required removal of buildings and equipment for failure to obtain operating plan). These cases, which hold that the right to conduct mining operations is contingent on compliance with the operating plan regulations, leave no doubt that petitioner's activities were subject to the same restrictions.

5. Finally, both petitioners attack the judgment below on the ground that the Forest Service violated a supposed policy of safeguarding miners' rights by using the prosecution of individuals who violate Forest Service regulations as "a compliance measure of last resort." 90-453 Pet. 21-24; 90-466 Pet. 9-10, 14-15. Petitioners derive this supposed policy principally from 36 C.F.R. 228.7, which calls for Forest Service officers to issue a "notice of non-com-

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were promulgated only 13 months before the appeal was decided. See 39 Fed. Reg. 31,317 (1974). It is not even clear whether Cruthers' unpatented claim was on national forest land or on a type of federal land for which operating plans are not required. See *Richardson*, 599 F.2d at 293-295 (discussing management of surface resources on unpatented mining claims by the Department of Interior's Bureau of Land Management).

pliance" when miners' violations of operating plan regulations cause unnecessary or unreasonable damage to surface resources, and from the general guidelines contained in Sections 2817.03 and 2817.3 of the Forest Service Manual, see Pet. App. 62a-69a.

The provisions on which petitioners rely present no obstacle to upholding petitioners' convictions. Section 228.7 of the operating plan regulations does not limit enforcement under Part 261 of 36 C.F.R., either expressly or by implication. As the court of appeals observed, the absence of independent enforcement provisions in Part 228 and the reference to operating plan violations in Section 261.10 undercuts any argument that Part 228 provides the exclusive means of enforcing operating plan violations. Pet. App. 10a-11a. And the Forest Service Manual, as the court of appeals stated, "merely establishes guidelines for the exercise of the Service's prosecutorial discretion; it does not act as a binding limitation on the Service's authority." Pet. App. 27a. That conclusion accords with the more general point that internal agency guidelines, unless mandated by the Constitution or a statute, do not have the force of law. See *United States* v. *Caceres*, 440 U.S. 741, 749-751 (1979); *United States* v. *Wilson*, 614 F.2d 1224, 1227 (9th Cir. 1980).[14]

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[14] Petitioner Rory Doremus's argument (Pet. 24-25) that the rule of lenity compels reversal of his conviction for destroying natural features is also without merit. The rule of lenity functions as a tie-breaker in cases in which the normal tools of statutory construction cannot resolve an apparent ambiguity in a criminal standard. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 29 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 342-343 (1981). Petitioners' convictions under Section 261.9(a), however, present no ambiguity to be resolved.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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